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No. 84-700

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

WEST MICHIGAN BROADCASTING COMPANY,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA

REPLY OF PETITIONER WEST MICHIGAN
BROADCASTING COMPANY TO BRIEF FOR THE
FEDERAL COMMUNICATIONS COMMISSION IN
OPPOSITION

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**REPLY OF PETITIONER WEST MICHIGAN
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Petitioner West Michigan Broadcasting Company ("West Michigan") hereby replies to the "Brief for the Federal Communications Commission in Opposition" ("Opposition") to West Michigan's petition for writ of certiorari ("Petition") in the above-captioned proceeding.

In opposing the grant of certiorari in this case, the Federal Communications Commission ("FCC") acknowledges that "[p]etitioner [West Michigan] ask[ed] this Court . . . to address the important and sensitive questions of whether and if so in what way the race of an applicant may be considered in



awarding a broadcast license," Opposition at 5, and concedes that "serious constitutional questions are implicated by the consideration of race in the awarding of broadcast licenses" Opposition at 8. The FCC contends, however, that "this is not an appropriate case for examining those questions," Opposition at 8, because "it is by no means clear . . . that race was the dispositive factor in its decision." Opposition at 5. The FCC's down-playing of the centrality of race to the decision is wholly inaccurate, and unfortunately, misleads the Court.

A simple analysis of the facts reveals that race was indeed the dispositive factor in this case. West Michigan has clearly made this point in its petition for writ of certiorari. Petition at 5-10. Moreover, the FCC's own Review Board has explicitly made this point in a recent decision. In Santee Cooper Broadcasting Company, 91 F.C.C.2d 1260, FCC 85R-4, released January 16, 1985 at 15, the Review Board noted:

in Waters Broadcasting Corp., 91 F.C.C.2d 1260 (1982) (footnote omitted), the Commission indicated that "substantial enhancement credit" should attend a 100% minority-integrated applicant, id., at 1264, and it concluded: "Accordingly, minority ownership policy is to be given full application and significant weight in comparative broadcast proceedings." Id., at 1266. In Waters, therefore, an FCC-favored minority applicant prevailed over a non-favored competitor whose comparative credentials were otherwise admittedly superior. 90 F.C.C.2d at 1266.

(emphasis added).



In short, there is no escaping the very constitutional issue which the FCC concedes is a "serious" one. Race has been used in this case as the basis for awarding a broadcast license, despite the absence of any of the public-interest justifications for such race-based preferences which this Court has required in the past. This case stands as a judicial imprimatur of racial preference for its own sake. This Court should grant certiorari and consider this very significant issue.

Respectfully submitted,

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